IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 9TH APRIL 2007 / 19TH CHAITHRA 1929

Ex.SA.No. 10 of 2006()

AS.8/2005 of I ADDL.SUB COURT,ERNAKULAM
E.A.NO.493/05 IN E.P. NO.753/04 IN
OS.471/1996 of PRL.M.C.,ERNAKULAM

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: APPELLANTS/RESPONDENTS 1 & 2 IN A.S./PETITIONERS IN E.A.

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1. LEELA, AGED 58 YEARS, D/O.AYYAPPAN
AND KARTHYAYANI, KAITHAMANA HOUSE, PONJIKKARA,
MULAVUKAD, NOW RESIDING AT PUTHUSSERY HOUSE,
ELAMAKKARA.

2. BABU, S/O.AYYAPPAN, KAITHAMANA HOUSE,
PONJIKKARA, MULAVUKAD.

BY ADV. SRI.C.KHALID
SRI.T.B.HOOD
SRI.M.ISHA
SRI.P.ANOOP (MULAVANA)

RESPONDENTS: APPELLANTS & RESPONDENTS 3 TO 7 IN A.S./RESPONDENTS IN E.A.

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1. MRS.BERNADEETHA, W/O.LATE THOMAS,
AGED 75, KARAKKAPARAMBIL HOUSE, HOUSE NO.1/146,
MULAVUKADU, PONJIKKARA, ERNAKULAM NOW RESIDING
AT 145 LINKON P1 DARFIELD, NOW JERCY 07026,
U.S.A.

2. MRS.MARY K.THOMAS, AGED 53,
D/O.LATE THOMAS, KARAKKAPARAMBIL, 814, SCALE
POINT, DR.REDDY WOOD CITY, C0 94065,
U.S.A..NOW RESIDING AT HOUSE NO.28, CAMELOT,
DR.SHREWPURY, MA 01545, U.S.A.

3. JOSEPH FRANKLINE, AGED 47,
S/O.LATE THOMAS, KARAKKAPARAMBIL, 25B,
CASTLE GATE DRIVE, SPRINGFIELD, MA 01129,
U.S.A. NOW RESIDING AT 145, LINKON P1, DARFIELD,
NJ 07026, U.S.A.

4. PETER THOMAS, AGED 46, S/O.LATE THOMAS, KARAKKAPARAMBIL, HOUSE NO.1/146, MULAVUKADU, PONJIKKARA, ERNAKULAM, NOW RESIDING AT 442, GLENDALE ROAD, GLENDEW I.A.60025, U.S.A.

5. DORAISWAMY, HUSBAND OF MONI, AGED 59, TEA SHOP KEEPER, BUILDING NO.1/146, MULAVUKAD PANCHAYAT, PONJIKKARA, MULAVUKADU P.O., KANAYANNUR TALUK.

6. MANY, W/O.IST JUDGMENT DEBTOR DORAISWAMY, AGED ABOUT 49 YEARS, RESIDING IN A PORTION OF THE BUILDING BEARING PRESENT MULAVUKADU PANCHAYAT DOOR NO.1/146, PONJIKKARA, MULAVUKADU P.O., KANAYANNUR TALUK.

7. DHANYA, D/O.THE IST JUDGMENT DEBTOR, DORAISWAMY, AGED ABOUT 29, RESIDING ALONG WITH JUDGMENT DEBTORS 1 & 2 DOOR NO.1/146, PONJIKKARA, MULAVUKAD P.O., KANAYANNUR TALUK.

8. DINESH, S/O.IST JUDGMENT DEBTOR, DORAISWAMY, AGED 26, RESIDING ALONG WITH JUDGMENT DEBTORS 1 & 2, DOOR NO.1/146, PONJIKKARA, MULAVUKAD P.O., KANAYANNUR TALUK.

9. ARUN, S/O.IST JUDGMENT DEBTOR DORAISWAMY, AGED 23, RESIDING ALONG WITH DEFENDANTS 1 & 2 DOOR NO. 1/146, PONJIKKARA, MULAVUKAD P.O., KANAYANNUR TALUK.

BY ADV. SRI.K.C.CHARLES FOR R1
SRI.D.M.NOWFAL

THIS EXECUTION SECOND APPEAL HAVING BEEN FINALLY HEARD ON 09/04/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A.NO.1985/06 IN EX.S.A.NO.10 OF 2006

9/4/07 DISMISSED SD/- M.Sasidharan Nambiar
Judge

/true copy/

M.SASIDHARAN NAMBIAR,J.

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Ex.S.A NO. 10 OF 2006

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Dated this the 9th day of April, 2007

JUDGMENT

What is the effect of a decree for recovery possession of the tenanted premises obtained by the landlord impleading some of the legal heirs of the deceased tenant is the question to be decided in this appeal.

2. The factual matrix in brief is as follows:- Respondents 1 to 4 the decree holders are the legal heirs of original landlord Thomas. According to them, plaint schedule building was rented out to Ayyappan and on the death of Ayyappan it was in the possession of Karthiayani, his widow and children and after the death of Karthiayani, respondents 5 to 9 are in possession of the building. First respondent originally filed O.S.1139/1984 impleading Karthiayani and respondents 5 to 8 seeking a decree for recovery of possession contending that tenancy which originally was with

Ayyappan devolved on Karthiayani and her children and it was terminated and the building is not situated within the area covered by Kerala Buildings (Lease and Rent Control) Act and therefore first respondent is entitled to a decree for recovery of possession. In the suit, defendants raised a contention that all the legal heirs of Ayyappan are necessary parties and they are protected by the provisions of Section 106 of Kerala Land Reforms Act and that question has to be referred to the Land Tribunal as provided under section 125(3) of Kerala Land Reforms Act. It was contended by them that land was obtained on a ground rent of Rs.120/- per annum in 1944 by Ayyappan and he constructed the building and hence entitled to the protection under section 106 of Kerala Land Reforms Act and therefore is not entitled to recover possession of the same. As he is bound to the trial court referred the question whether defendants are entitled to the benefit claimed under Kerala Land Reforms Act, to Land

Tribunal under section 125(3) of Kerala Land Reforms Act. When the reference proceedings was pending before the Land Tribunal, Karthiayani died. Though first respondent filed original of Ext.A2 application to implead all the legal heirs of Karthiayani, as the Land Tribunal had no powers to implead the legal heirs in pending reference proceedings, the case records were forwarded to the trial court. On the failure of first respondent plaintiff to implead the legal heirs, the suit was dismissed for default. Contending that she came to know about the dismissal of the suit only in 1995 and alleging that respondents 5 to 9 are the tenants in possession of the building and their tenancy was terminated, O.S.471/1996 was instituted seeking a decree for recovery of possession. Ext.A5 is the copy of the plaint. The copy of the written statement filed by defendants in O.S.471/1996 was not produced. As per judgment dated 27.3.1998, trial court granted a decree for recovery of possession with arrears of rent. The

case of protection claimed under section 106 of Kerala Land Reforms Act by defendants were rejected. Defendants challenged the decree and judgment before Sub Court, Ernakulam in A.S.33/1999. The first appellate court as per judgment dated 31.10.2000 allowed the appeal and held that the suit is barred under the provisions of Rule 9 of Order IX of Code of Civil Procedure. The decree was consequently set aside. Respondents 1 to 4 challenged the said judgment before this Court in S.A.926/2000. This court as per judgment dated 30.10.2002 set aside the judgment of the first appellate court and remanded the first appeal for fresh disposal holding that the suit is not barred as provided under Rule 9 of Order IX of C.P.C. The Sub Court thereafter allowed the appeal and remanded the suit to Munsiff Court, Ernakulam as per judgment dated 28.2.2003, with a direction to refer the claim for protection under section 106 of Kerala Land Reforms Act to the Land Tribunal and decide the suit only after receipt of the finding.

Respondents 1 to 4 challenged that judgment before this court in C.M.A.69/2003. This Court as per judgment dated 7.6.2004 allowed the appeal and held that the question need not be referred to the Land Tribunal as settled by this court in **Govinda Panicker v. V. Sreedhara Warriar (ILR 2002 Kerala 493).** This court considered the question whether defendants are entitled to the protection under section 106 of Kerala Land Reforms Act. Holding that defendants did not establish a lease of land for the purpose of constructing a building for commercial purpose it was held that they are not entitled to the protection of 106 of Kerala Land Reforms Act. A decree for recovery of possession was granted. Respondents 1 to 4 sought execution of the decree in E.P.753/2004 before Prl.Munsiff Court, Ernakulam. Appellants, who are the other daughter and son of deceased Ayyappan and Karthiayani and the brother and sister of 6th respondent daughter filed E.A.493/2005 before the

executing court under Rule 97 of Order XXI of Code of Civil Procedure contending that the decree is not binding on them and the building was constructed by Ayyappan after obtaining the land on commercial lease and therefore they cannot be evicted by delivery in execution of the decree in O.S.471/1996. Learned Munsiff on the evidence of PW1 and Exts.A1 to A5, B1 and X1 upheld the case of appellants and allowed the claim petition. Respondents 1 to 4 challenged that judgment before Sub Court, Ernakulam in A.S.8/2005. Learned Sub Judge on reappreciation of evidence, holding that the decree is binding on all the legal heirs of Karthiayani as 6th respondent represented the estate of deceased Karthiayani, allowed the appeal and set aside the order of executing court and dismissed E.A.493/2005. It is challenged in this appeal.

3. The appeal was admitted formulating the following substantial questions of law.

i) When the plaintiffs/decree holders in Ext.A2 application filed by them before the Land

Tribunal very well knew who are the legal representatives of deceased Karthiayani and had also admitted in the plaint in O.S.471/96 that after the death of Ayyappan, Kanthiayani and her children (including the appellants herein)were continuing the business in the tenanted premises, was the lower appellate court justified in invoking the theory of substantial representation to reverse the order of the executing court?

4. Learned counsel appearing for appellants and respondents 1 to 4 were heard.

5. The argument of learned counsel appearing for appellants was that Ext.A2 application filed by first respondent in O.S.1139/1984, when the case stood referred to the Land Tribunal under section 125(3) of Kerala Land Reforms Act, establish that respondents 1 to 4 were aware that appellants are also legal heirs of deceased Karthiayani and still when the present suit was filed, they were not impleaded and therefore the principle of substantial representation has no application to

the present case and first appellate court should not have interfered with the findings of the executing court. It was argued that the contention raised in the previous suit evidenced by Ext.A1 was that on the death of Ayyappan the tenancy right devolved on Karthiayani and her children and respondents 5 to 8 have no right over the building and in O.S.471/1996 it was contended that respondents 5 to 9 are the tenants and the tenancy was terminated and defendants in that suit were not impleaded as legal heirs of deceased Karthiayani or representing the estate of Karthiayani and therefore the finding of first appellate court that 6th respondent substantially represent the estate of Karthiayani or appellants is incorrect and first appellate court should have confirmed the findings of executing court and should have found that the decree cannot be executed as against appellants. Reliance was placed on the decisions of the Apex Court in **Daya**

Ram v. Shyam Sundari (AIR 1965 SC 1049), N.K.Mohd.Sulaiman v. N.C.Mohd.Ismail Saheb (AIR 1966 SC 792).

6. Learned counsel appearing for respondents 1 to 4 argued that O.S.471/1996 was separately contested till the second appellate stage twice and though it was contended that the decree was the result of collusion, no evidence was adduced in support of the collusion and evidence of PW1, who alone was examined for the appellants, establish that after the death of Karthiayani, respondents 5 to 9 are in possession of the building as tenants and therefore first appellate court rightly held that the decree is binding on appellants also. It was further argued that on the death of original tenant Ayyappan and subsequently his widow, the rights devolved on their children and all of them are joint tenants and 6th respondent who was impleaded in the suit and who was in possession of the building along with her husband and children

represented the estate and first appellate court rightly held that the decree is binding on the appellants also and there is no reason to interfere with the said decree and judgment. Learned counsel relied on the decision of this Court in **Mohanambal v. Veeramani (1999(2) KLT 206), Cyriac John v. Jacob Cherian (1997(1) KLT 948), Mary v. Kunjanam (2002 (3) KLT 95),** and the decision of the Apex Court in **H.C.Pandey v. G.C.Paul (AIR 1989 SC 1470) and Rani Devi v. Bhole Nath (1992) 1 SCC 61), Ashok Chintaman Juker v. Kishore Pandurang Mantri(2001) 5 SCC page 1**) and argued that decree for recovery of possession obtained in O.S.471/1996 against respondents 5 to 8 is binding on the appellants also and the claim petition is not sustainable.

7. Though it was contended in the claim petition that the decree in O.S.471/1996 was obtained by respondents 1 to 4 in collusion with respondents 5 to 9, no evidence was adduced to substantiate the claim. On the other hand,

evidence of PW1, the first appellant who alone was examined on behalf of the appellants, establish that the alleged ill-feeling with 6th respondent sister arose only just before the filing of the claim petition and not at the time when the decree was obtained in O.S.471/1996. Moreover, as rightly pointed out by learned counsel appearing for respondents 1 to 4 records establish that O.S.471/1996 was stoutly defended by respondents 5 to 9. The matter came up before this court first in the second appeal and later as C.M.A against the order of remand passed by the first appellate court. The judgment of this court in C.M.A.9/2003 conclusively establish that the case was well defended and this court granted the decree for recovery of possession after overruling all the objections raised by respondents 5 to 9.

8. It is admitted case that Ayyappan was the original tenant under Thomas, the original landlord. Respondents 1 to 4 are the legal heirs of Thomas. It is also admitted case that Ayyappan

died before the institution of O.S.1139/1984, a suit for recovery of possession of the very same building instituted by first respondent which was later dismissed for default. On the death of Ayyappan, his tenancy right devolved on Karthiayani, the widow and the children including appellants and 6th respondent and deceased Subramonian the other son. The question is what is the right derived by legal heirs of a tenant? The question was settled by the Apex Court in **H.C.Pandey's case (supra.**) Their Lordships laid down the legal position as follows:-

> "It is now well settled that on the death of the original tenant, subject to any provision to the contrary either negativing or limiting the succession, the tenancy rights devolve on the heirs of the deceased tenant. The incidence of the tenancy are

> the same as those enjoyed by the original tenant. It is a single tenancy which devolves on the heirs. There is no division of the premises or of the rent payable thereof. That is the position as between the landlord and the heirs of the deceased tenant. In other words, the heirs succeed to the tenancy as joint tenants."

That position has been reiterated by the Apex Court in **Ashok Chintaman Juker's case (supra).**

9. The next question is whether a decree for recovery of possession impleading only some or one of the legal heirs of the deceased tenant is valid and binding on the other legal heirs who were not impleaded in the suit or the tenanted building. The question was considered by the Apex Court in **Ashok**

Chintaman Juker's case (supra). In that case, the original tenant Chintaman died and there was no division of the premises between the legal heirs. The question that was considered was whether the tenancy is joint or separate. It was held that the former case notice on any one of the tenants is valid and a suit impleading one of them as defendant is maintainable and the decree in such a suit is binding on all the tenants. Following the earlier decision in **Kanji Manji v. Trustees of the Port of Bombay (AIR 1963 SC 468)** and **H.C. Pandey's case (supra)**it was held that on the death of original tenant, subject to any provision to the contrary either negativing or limiting the succession, the tenancy rights devolved on the heirs of the deceased tenant and it is a single tenancy which devolved on the heirs. It was further held that respondent in that case acted on behalf of the tenant and he paid rent on behalf of his father and accepted notice on behalf of all and in

such circumstance, notice served under section 106 of the Transfer of Property Act on the respondent was sufficient and valid.

10. Division Bench of this Court in **Mary's case (supra)** following the said decision held:-

> "It is evident from the above mentioned definition that on the death of original tenant, tenancy rights devolve on his heirs as joint tenants, unless there is a provision to the contrary either negativing or limiting the succession, the tenancy rights devolve on the heirs of the deceased tenant. It is a single tenancy. There is no division of the premises or of the rent payable thereafter and that is the position as between the

landlord and the heirs of the deceased tenant. In other words, the heirs succeed to the tenancy as joint tenants. Once it is held that the tenancy was joint, a notice to one of the joint tenants was sufficient and the suit for same reason is also good. Unless and until there is evidence of disruption of the tenancy or division of premises or in the matter of payment of separate rent, the heirs succeed to the tenancy as joint tenants. In this case as we have already indicated notice to one of the tenants is valid and the Rent Control Petition impleading one of them is maintainable

and order of eviction passed in such a case is binding on all the tenants."

Though learned counsel appearing for appellants relied on the earlier decision of the Apex Court in **N.K.Mohd.Sulaiman's case (supra), and Daya Ram v. Shyam Sundari (supra)** in view of the settled legal position that on the death of the original tenant, his tenancy right will devolve on the legal heirs as joint tenants and one of the joint tenants in possession of the building is competent to represent the others and the estate, the said decisions have no application.

11. Evidence of PW1 establish that after the death of Karthiayani, the widow of deceased Ayyappan, the original tenant, plaint schedule building has been in the possession of 6th respondent her daughter and one of the legal heirs of the deceased. PW1 also admitted that sixth respondent was paying the rent and was doing the

business in the building. In such circumstance, the sixth respondent, one of the joint tenants is competent to represent the estate of deceased Ayyappan which devolved on his widow and children including the appellant. The first appellate Court therefore correctly found that the decree obtained by respondents 1 to 4 in O.S.471/1996 is valid and binding as against appellants who are the other legal heirs of deceased Karthiayani and they are not entitled to obstruct the delivery pursuant to the decree passed by this Court. There is no merit in the appeal and it is dismissed.

If the execution petition was dismissed by the executing court, consequent to the order in E.A.493/2005 and is not restored even after the judgment in A.S.8/2005 executing court shall restore the execution petition and proceed with execution petition.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

Ex.S.A.10 /2006

JUDGMENT

9th April 2007